STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 9, 2003
V	No. 242147 Saginaw Circuit Court
MANUEL GOMEZ, Defendant-Appellant.	LC No. 01-019845-FC

Before: Whitbeck, C.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Defendant Manuel Gomez appeals as of right his jury trial conviction of assault with intent to do great bodily harm less than murder, MCL 750.84, and carrying a concealed weapon, MCL 750.227. Defendant was sentenced to 71 months' to 15 years' and 36 months' to 7 years' imprisonment respectively. Defendant challenges the prosecutor's witness questioning, content of the prosecutor's argument, and the effective assistance of his counsel. We affirm.

Defendant's first issue on appeal is that the prosecutor improperly questioned defendant and made improper comments during closing argument. We disagree. Generally, claims of prosecutorial misconduct are reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

Claims of prosecutorial misconduct are decided case by case, and the prosecutor's remarks are evaluated in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Prosecutors are accorded great latitude when making their arguments. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant alleges the prosecutor improperly questioned him with impeachment evidence that was used during another witness's examination, by asking defendant if the witness was lying, and by referring to impeachment evidence as substantive evidence during closing arguments. A prior inconsistent statement is admissible for impeachment purposes but not to prove the truth of what was said. *People v Hallaway*, 389 Mich 265, 276; 205 NW2d 451 (1973). Inconsistent statements are offered "to prove that the inconsistent statement was in fact

made, irrespective of its truth, for the purpose of impeaching contrary testimony from the witness stand." *Id*. If a witness adopts the facts contained in the prior statement, it becomes substantive evidence. *People v Harris*, 56 Mich App 517, 525; 224 NW2d 680 (1974).

The prosecutor did not impermissibly use impeachment evidence as substantive evidence during defendant's questioning. The questions sought to verify or refute the prior witness' testimony, which was permissible. Questioning defendant about the witness' testimony was not improper. Further, the prosecutor's remarks about the witness' testimony in closing arguments were permissible. A prosecutor's comments "must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The witness stated she lied when she implicated defendant in the stabbing because she was afraid of the police. The discrepancies between her statement to the police and her trial testimony were properly and vigorously addressed by the prosecutor and defense counsel in closing argument, and arguments regarding inconsistencies in statements and witness credibility were proper. See *People v Couch*, 49 Mich App 69, 72; 211 NW2d 250 (1973). Additionally, the jury was instructed that the witness' prior statement to the police could only be used to determine if she was truthful, not to prove the elements of the crime.

Regarding defendant's claim that the prosecutor impermissibly asked him to comment on a witness' credibility, we find the prosecutor erred. "[I]t is improper for a prosecutor to ask a defendant to comment on the credibility of prosecution witnesses since a defendant's opinion on such a matter is not probative and credibility determinations are to be made by the trier of fact." *People v Loyer*, 169 Mich App 105, 117; 425 NW2d 714 (1988). Defendant's viewpoint on the witness' credibility was irrelevant. See *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, the error was harmless. See *id*. The witness' testimony was not bolstered in any way by the exchange, and defendant reiterated that the witness got part of the story correct but not the rest. See *id*. Defendant was not harmed by the brief exchange. MCL 769.26.

Defendant also argues that the prosecutor's argument that defendant hid out for three weeks was prosecutorial misconduct. A prosecutor may argue reasonable inferences from the facts. *People v Davis*, 57 Mich App 505, 513; 226 NW2d 540 (1975). The prosecutor did not make arguments based on impossible determinations. The prosecutor's comments were based on defendant's testimony that he knew the police were looking for him in relation to the stabbing, but he was trying not to be found. The prosecutor's comments that defendant was "hiding out" were reasonable inferences from the facts.

Defendant's second issue on appeal is that defense counsel was ineffective for failing to object to the prosecutor's use of impeachment evidence as substantive evidence. We disagree. Whether a defendant "has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id*.

The right to counsel is essential to a fair trial and encompasses the right to effective assistance of counsel. *People v Pubrat*, 451 Mich 589, 593-594; 548 NW2d 595 (1996). Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

To reverse an otherwise valid conviction based on ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To find counsel's performance objectively unreasonable, counsel must have made "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To prove prejudice, a defendant must show there is a reasonable probability that, but for the alleged error, the result of the proceedings would have been different and the proceedings were fundamentally unfair or unreliable. *People v Shively*, 230 Mich App 626, 628; 584 NW2d 740 (1998). A defense attorney is given great discretion regarding trial strategy and tactics. *Pickens*, *supra* at 330. Merely because a decision was unsuccessful does not presume error. *Id*. In matters of trial strategy, this Court does not substitute its own judgment or assess competence with the benefit of hindsight. *Rockey*, *supra* at 76-77.

The prosecutor did not improperly use impeachment evidence as substantive evidence or improperly refer to defendant's "hiding out"; therefore, defense counsel was not ineffective for failing to object. Defense counsel is not required to make meritless objections. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001). Additionally, the jury was instructed how to properly use the witness' prior statement to the police. While the prosecutor's questions to defendant about a witness' credibility were in error, defense counsel's failure to object was not. Because the questions were brief, defense counsel's decision not to object was reasonable trial strategy. See *People v Reed*, 449 Mich 375, 400; 535 NW2d 496 (1995).

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio